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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1496

NATHAN T. DILL,

Petitioner,

vs.

SOUTHERN JOINT COUNCIL OF THE AMALGAMATED DIVISIONS OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC; THE GREYHOUND CORPORATION; AND SOUTHERN GREYHOUND LINES, A DIVISION OF GREYHOUND LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION OF THE SOUTHERN JOINT COUNCIL OF THE AMALGAMATED TRANSIT UNION, AFL-CIO, CLC.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Not Granting the Writ	15
Conclusion	23

TABLE OF AUTHORITIES CITED.

Balowski v. International Union, UAW, 372 F. 2d 829 (6th Cir.) 18

Bazarte v. United Transportation Union, 429 F. 2d 868 (3rd Cir.) 19

Czosek v. O'Mara, 397 U. S. 25 17

De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F. 2d 281 (1st Cir.) 17, 18, 19

Elgin J. & E. Ry. Co. v. Burley, 325 U. S. 711.....19, 20

Ford Motor Co. v. Huffman, 345 U. S. 330 .....17, 19

Humphrey v. Moore, 375 U. S. 335 .....15, 16, 17

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387 17

Rice v. Sioux City Memorial Park, 349 U. S. 70 22

Rudolph v. United States, 370 U. S. 269 15

St. Clair v. Local Union No. 515, 422 F. 2d 128 (6th Cir.) 17

Vaca v. Sipes, 386 U. S. 171 .....17, 18, 20

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OPINIONS BELOW.

The opinion of the court of appeals is officially reported at 435 F. 2d 231, and is reprinted at pp. A28-A42 in the appendix printed at the back of Dill's petition.[1] The

1. Appendix references with an "A" prefix are to the pages of the appendix appearing at the back of Dill's petition. References designated "App. II" are to the exhibits reproduced in Volume II of the appendix filed in the court of appeals. All other record references are to the printed appendix filed in the court of appeals.

opinion of the district court has not been officially reported, but is unofficially reported at 76 LRRM 2060; it is reprinted at pp. A2-A23 of petitioner's appendix.

JURISDICTION.

Petitioner does not cite any statutory provision believed to confer jurisdiction in violation of the Court's Rule 23 (1)(b)(iii).

QUESTIONS PRESENTED.

1. In a suit by an employee against his employer for breach of a collective bargaining agreement, and against his union for breach of its duty of fair representation, did the court of appeals properly reverse the judgment of the district court upon finding that:

(a) the employer did not breach the agreement because the evidence did not support the district court's construction thereof, which conflicted with the construction placed upon it in good faith by the employer and the union; and

(b) the union did not breach its duty of fair representation because there was no evidence that the union's handling of the employee's grievance was arbitrary, discriminatory or in bad faith.

2. In the event the Court grants a writ of certiorari and reverses the judgment of the court of appeals on the two issues set forth above, this case would also present the following questions:

(a) does the general policy of the federal labor laws, which provides for compensatory damages as the remedy for a union's breach of its duty of fair representation, also empower the federal courts to assess punitive damages against it for the same misconduct;

(b) assuming that punitive damages can be assessed against a union for breach of its duty of fair representation,

(i) may such damages be assessed in the face of a finding that the union is not liable for any of the actual damages suffered by the plaintiff, and (ii) was punitive damages warranted in view of the fact that the union was acting in good faith.

STATEMENT.

Southern Greyhound Lines (hereinafter referred to as the Company), a division of Greyhound Lines, Inc., provides common carrier bus service in the southeastern United States. Its headquarters is in Lexington, Kentucky. Respondent Southern Joint Council (hereinafter referred to as the Union or the Southern Council) is the exclusive bargaining representative of the Company's operators (bus drivers), garage and terminal employees throughout the Company's system. The Southern Council consists of eight local divisions of the Amalgamated Transit Union, each of which represents the unit employees in one of the eight seniority districts into which the Company is divided (A29-30).

The Southern Council negotiates a single company-wide collective bargaining agreement, and meets with the Company every sixty to ninety days to discuss and resolve contractual and other problems arising in their collective bargaining relationship (A4; App. 193). Disputes and grievances affecting the interests of employees in more than one seniority distict are processed at these meetings (App. 193). No grievance handled by the Southern Council can be submitted to arbitration except by the Council (App. II 6).

Each local division elects one representative to the Southern Council, usually the local division president. The members of the Southern Council elect three officers: chairman, vice chairman and secretary-treasurer (App. 192-193). In deciding issues, each member of the Southern Council has but one vote (*ibid.*).

The contract between the Company and the Union does not regulate the method or standards for hiring and training operators. The Company employs more than 2300 operators and usually hires and trains between forty and one-hundred new operators each year (App. 168; App. II 11). Historically, applicants for employment as operators who satisfied the Company's initial requirements were sent to a Company-run training school, which was held at least once a year (App. 28, 134, 136). Applications would be received and held by the Company until it was ready to conduct a driver training class (App. 136.) The applicants would then be screened and the ones who qualified would be summoned to the school (*ibid.*). Operator trainees were not in the bargaining unit represented by the Southern Council, and their terms and conditions of employment were not covered by any collective bargaining agreement (App. 29). The trainees were paid the nominal sum of $8.00 per day while in school (*ibid.*). Those who completed the course were then assigned by the Company among the eight seniority districts, as needed.

Newly graduated operators came into the bargaining unit and became covered by the agreement when they were assigned to a terminal and their names were placed on the assignment board (App. 21-32). Under the collective bargaining agreements preceding the one effective November 1, 1962, an operator's seniority would start from the date and hour his name was put on the assignment board. Where several new drivers in the same district satisfied their preliminary requirements together, the manner in which they were ranked as between themselves was not regulated by contract and varied from district to district (App. 169, 194, 221). In the district represented by Local Division 1493, for example, new operators with the same date and hour on the assignment board were ranked in alphabetical order (App. 221). In other districts of Southern Grey-

hound, rankings were determined by lot (App. 194). In no district was seniority ranking determined by the date and time the employment application was filed.

In May 1963, the Company and the Southern Council entered into a new two-year contract effective retroactively from November 1, 1962 to October 31, 1964 (App. 230-231). Many of the terms of this new agreement were adopted, verbatim and without discussion, from the collective bargaining agreement between Eastern Greyhound and the Eastern Council (*ibid.*). The Southern Council had proposed the Eastern contract as a package in order to get the higher wage rates contained therein (App. 230). One of the terms so adopted without discussion provided a new and uniform method by which seniority ranking should be determined for new operators. The new clause read:

> ARTICLE IV.
>
> *NC* Section 1. SENIORITY ESTABLISHMENT—* * *
>
> The seniority rank of operators will be determined by the date of graduation from Drivers' School and prior to breaking-in and, as to simultaneous graduation, by the hour and date of application for employment. An operator graduated from Divers' School ahead of his class will, for seniority rank purposes, be deemed to have graduated with his class. All applications are to be stamped as of the time of filing.
>
> Duplicate copies, properly stamped, wil be furnished to the Local Division after applicants become employees.
>
> For pay rate purposes, commencement of employment shall be deemed to be the date of the commencement of actual service.

On September 4, 1963, petitioner Nathan T. Dill filed an application at the Company's Memphis teminal for em-

ployment as an operator (App. 27-28, App. II 2).[2] The person who took Dill's application told him he would be called to the operator's school when it started (App. 28).

On November 15, 1963, in an unprecedented move, Greyhound decided to utilize an outside agency from Richmond, Virginia, Personnel Training Institute (PTI), "to recruit, select and train new drivers for the year 1964" (App. 134, App. II 64). Greyhound made this change because it planned to employ in 1964 two to six times the number of new operators it usually employed each year, due to the additional business the Company anticipated would be generated that summer by the New York World's Fair (A9, App. 168).

In recruiting trainees, PTI sent representatives to various cities and towns to solicit applicants directly through newspaper ads and the like, and interview men referred to them by Greyhound who had already filed employment applications locally (App. 89-90, 164, 179-180). All applicants, whether recruited directly by PTI or referred by Greyhound, were required to fill out an "application for admittance to the Personnel Training Institute" and advised that the school would cost them about $35.00 per day (App. 28-30, 160-161, 161-165, 179-180). Applicants who satisfied PTI's and Greyhound's requirements were then accepted for PTI's driver training school, which was to be held in Atlanta, Georgia.[3]

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2. Dill was then employed at the terminal as a mechanic, but Company policy required that a new application be filed if an employee wanted to become an operator (App. 27, 169).

3. Petitioner asserts that PTI did not begin interviewing applicants until after January, 1964 and that two trainees who claimed to have applied to PTI in December 1963 were not telling the truth (Pet. 7, 8). These assertions are not supported by any findings of fact made by either the district court or the court of appeals. Rather, Dill relies on the testimony of a Greyhound safety supervisor who was assigned to PTI's school after the first class began (App. 88). During the course of his testimony, the supervisor

Dill was interviewed by PTI on February 28, 1964. He filled out the PTI forms and was told of the new training arrangements. Upon meeting the qualifications established by PTI and Greyhound, and agreeing to pay the established fee for the training, Dill was accepted by PTI and assigned to the first class which began in Atlanta on March 16, 1964.

A total of 247 applicants graduated from the three classes PTI conducted for Greyhound. Dill's class, which consisted of approximately 82 trainees, graduated on April 10, 1964.[4] Under the terms of the collective bargaining agreement, this became the graduates' seniority date with Greyhound and the Company was obliged to rank these men on the basis of the date and hour they filed their employment applications. This was the first time that Greyhound had occasion to apply the new seniority ranking provisions of the agreement (App. 172).

The Company prepared the rankings while the first group of PTI students was in school. At its headquarters in Lexington, Kentucky, Greyhound's vice president for industrial relations, Henry Bransom, decided that the date and time on the PTI forms should be used to establish the men's rank (App. 133). He based his decision on the fact that all PTI students would have completed a dated PTI application and interview form, whereas every few would have filled out a Greyhound application (App. 147-149, 160-161,

guessed that PTI began recruiting after January 1964, but prefaced his guess with the admission that he "did not have that information" (App. 99). Hence, the supervisor's testimony on this point is worthless.

4. Petitioner states that "most" of Dill's class "had been recruited by Greyhound and had filed Greyhound applications" (Pet. 7). This statement is in error. Greyhound recruited no one, but merely accepted applications from those who came to it seeking employment as operators. Moreover, the record does not show how many members of Dill's class applied to Greyhound before filing PTI application forms, for a number of Greyhound applications were prepared after the trainees completed PTI school, and some of them may have been backdated (App. 129-130, 147-148).

App. II 72). This decision was made unilaterally and without consultation with the Southern Council (App. 133).

Accordingly, Greyhound's representative at the PTI school, John Moran, was directed to prepare a roster of the first class showing the date and time of each trainee's PTI interview (App. 89-90). Moran proceeded to photocopy the first page of each trainee's PTI form which contained the required information (App. 90-91, 107-108). Before he could finish the project, however, PTI removed the forms from the Atlanta school and shipped them to its headquarters in Richmond, Virginia where they were made unavailable to Greyhound (App. 96, 106).[5] In order to complete his project, Moran interviewed each student and had him fill out a card with his date and time of PTI application (App. 93, 94-95, 101, 110-111). Consolidating the cards thus obtained with the PTI forms he had copied, Moran prepared a roster showing the date and time of each student's PTI application, which he sent to Lexington (App.

5. The district court found that Moran copied 24 out of the 82 PTI forms (All), and petitioner so states in his petition (p. 8). The court of appeals, however, did not affirm this finding (A32-A33, n. 2). Actually, Moran testified he could not remember how many applications he copied (App. 95). Petitioner and the district court apparently base their figure on the number of PTI entries in Exhibit 21 (App. II, 49-53). That exhibit, however, only purports to show the number of PTI applications which the Company could retrieve from its various district office files after this suit began in 1967 (App. 70-71, 76, 126-127). The record clearly discloses that Exhibit 21 does not show all the PTI forms the Company had when the first seniority list was prepared for the PTI class of April 10, 1964. For example, while Exhibit 21 shows only a Greyhound application for Paul C. Smith III, Exhibit 25, a Greyhound inter-office memo dated June 12, 1964 shows that the Company corrected his date of seniority rank by reference to "the photostatic copies of the first page of the guided interview reflecting date and time of the interview of Operator Smith." See also App. 76-77, 80, 93, 114, 130-131.

83-87, 91, 96-98, 101, 112-113, Ex. 22).[6] On the basis of this roster, a clerk at Company headquarters prepared a seniority list ranking the men with an April 10, 1964 seniority date in the order they were shown to have applied to PTI.[7]

After graduating from PTI school, Dill was assigned to the Memphis terminal. Shortly after July 1, when the first seniority roster following his graduation was posted, Dill noticed that he was ranked approximately fifty-fifth out of the eighty-two men with his seniority date. Dill thought he was entitled to be ranked at or near the head of that group

6. Petitioner states, p. 8, that Moran interviewed the students after posting a notice that the class rankings would be based on the date and hour of their PTI application. Nothing in the record, however, supports that claim. Moran testified he could not remember whether he posted the notice before or after he interviewed the students, and Dill testified he never saw the notice App. 111-112, 48-49). Petitioner also states that Moran interviewed 58 students (p. 8). This claim, too, is unsupported by the record. Moran testified he could not remember how many students he interviewed (App. 115-116). The district court found that Moran interviewed 58 students (All), but the court apparently obtained that figure by subtracting the number of PTI forms it believed Moran had copied from the total number of graduates in the April 10 class. However, as shown in the preceding footnote, the record provides no basis for determining how many PTI forms Moran was able to copy.

7. Petitioner asserts, p. 8, that "the Company had Greyhound applications for employment for 65 of the 82 graduates in Dill's class" when the list was prepared. This statement, too, is incorrect. In the first place, Greyhound applications were taken in the field and they were not sent to Lexington where the seniority roster was prepared (App. 91, 129-130, 147-148). Secondly, there is no way of knowing how many Greyhound forms were filled out at the time the seniority roster was prepared, for a number of operators filled out Greyhound forms *after* they had completed PTI school (*ibid.*). The figure of 65 Greyhound forms was obtained from Exhibit 21, which the Company prepared four years after the events in question (App. 76, 77, 78, 79). Even Exhibit 21, however, shows that 65 is not a correct number, for it shows that one application was undated (Dorsey A. Love), and two were dated after the operators had graduated and become full-time employees (Johnny L. Lee, 4-29-64; and Phillip R. Leppo 5-1-64).

based on the date of his application for employment with Greyhound as an apprentice mechanic in 1957. Dill complained to the Company but his complaint was rejected (App. 36-40). He then filed a grievance with his local union and was told two similar grievances previously filed by operators Douthitt and Nipp were already on the agenda for the next Company-Council meeting scheduled a few weeks hence (App. 40, App. II 12, 66).

The Southern Council met with the Company on August 26, 1964 (App. 140, 207). When they discussed the Douthitt-Nipp grievance, the Council learned that the Company had used the PTI application dates to establish seniority ranking for all 247 PTI graduates (App. 149, 152, 207-209, 241-242). Neither the Council nor the local divisions had been supplied with any of the applications, as required by the contract, and the Council found discussion impossible because it did not have the facts (App. 210). At the Council's request, therefore, the Company agreed to supply all the PTI and Greyhound applications it had for the 247 graduates and the parties agreed to postpone further discussion of the matter until the Council had had an opportunity to examine the records (*ibid.*).

The Company mailed the PTI and Greyhound forms to Daniel Maroney, Council president, on November 12, 1964 (App. 153, 209). The delay was occasioned by intervening negotiations for a new contract, and the time required by Company officials to contact the various regional offices to which PTI graduates had been assigned and ask them to send to Lexington all the available forms (App. 81, 126-129, 152-153, 176, 209-210). Prior to the next Council-Company meeting on January 12, 1965, the Council members started to examine the more than 200 PTI and Greyhound forms Maroney had received (App. 195-196, 216-219, 248-249). They observed that a number of forms were missing and that many of the forms were incomplete (App. 196, 199).

The Council then appointed a special committee of other local division officers to go over all the forms to insure that the method used to rank the employees was consistent with the contract (App. 210-211).[8]

The special committee spent three to four hours trying to build a seniority roster for the 247 PTI graduates based on the forms they had (App. 287-292). Most of their time was spent with Dill's class of April 10 (App. 282). The committee, however, was unable to rank all the PTI graduates because the forms for some were completely missing, the forms of others were incomplete as to date and time of application and some graduates had several forms (App. 271-285).

The committee reported back to the Council that it could make no recommendation for changing the seniority roster on the basis of the records supplied by the Company (App. 218, 280). The Council then met with the Company, and for the first time, learned why many PTI forms were missing and how the Company had personally interviewed the trainees to get the necessary information from those men whose PTI forms had become unavailable (App. 219-220, 238-239). After further discussion of the matter, the parties agreed to postpone disposition of the grievance until the next meeting so that the Council could devote more time to study the problem (App. 220).

The next Company-Council meeting was set for March 10, 1965. Prior thereto, the Council members met to discuss the Douthitt-Nipp grievance (App. 222). They discussed possible alternative methods for establishing the ranking for each class, such as by lot or alphabetical order, but rejected them as not being consistent with the intent of

8. The district court erroneously found that the special committee was not appointed until the last grievance meeting on March 10 (A15). Equally erroneous was the district court's finding that the members of the committee had no prior knowledge of the dispute (A15). See App. 275-279.

their contract (App. 223-224).[9] They rejected using the Greyhound applications, because most of the PTI graduates had never filed one out, and some of the Company forms they did have were undated or had no time marked on them (App. 223-224). The Council members noted that the PTI applications were also incomplete, but that the Company had supplemented the available written PTI records with data secured through oral interviews (App. 196, 224, 250-251).

Reaching the conclusion that there was no way to adjust the PTI graduates' seniority in any other consistent manner as contemplated by the contract, and considering that the existing seniority ranking had been in effect for close to a year, the Council voted unanimously to accept the seniority roster as it stood (App. 224-225). The Council told the Company of its decision when they met, and the PTI seniority grievance was settled accordingly (App. 225, App. II 78-79).[10]

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9. The Southern Council had contacted the Eastern Council to learn how the parties to the Eastern Greyhound contract had interpreted this clause (App. 250). The Eastern Council was of no help, however, because Eastern Greyhound had never used an outside organization to train its operators (*ibid.*).

10. In his petition, p. 10, Dill states that representatives of Greyhound, Local 1500 and the Southern Council all "acknowledged" that the use of PTI application dates violated the contract. Neither of the courts below made such a finding, and the allegation is patently incorrect. The record references cited by petitioner are to the grievances filed (App. II 66, 69), and to statements made by Union officials either before they knew all the facts (App. II 12, 13), or in reference to the Company's failure promptly to supply the Union with copies of all the employment applications (App. II 15, 16, 18-19, App. 228). Accordingly, none of those statements can properly be construed as an "acknowledgement" that Greyhound's use of PTI dates breached the agreement. Similarly, Greyhound's statements that the roster is "in a big mess" and that the Company would do "whatever was necessary to straighten [it] out" do not constitute an admission of a breach of contract. Considering the facts as they became known, these statements merely refer to the obvious fact that the ranking of PTI graduates was a messy problem caused by the state of the Company's records.

When Dill was advised of the disposition of his grievance, he did not ask that it be submitted to arbitration, but appealed the Council's action to higher levels within the Amalgamated Transit Union. Receiving no satisfaction from those appeals, Dill finally filed the instant suit against the Company, Local Division 1500, and the Southern Council.

The case was tried without a jury. At its conclusion, the district court found that the Company had breached the seniority provisions of the agreement by not ranking Dill on the basis of the date and hour he filed his Greyhound application for employment as an operator (A21).[11] The court held that "the term 'application for employment' in this labor contract meant application for employment with Greyhound as a driver. It did not mean an application to attend the PTI drivers' school" (A21). The court found further that Local 1500 did not breach its duty of fair representation owed to Dill, but that the Southern Council did (A21-22). The court held that Local 1500 fulfilled its duty when it forwarded the Douthitt-Nipp grievance to the Southern Council, because the grievance affected operators on a system-wide basis, and only the Council had the power to handle it. The Council breached its duty, the court ruled, because it failed "to side with the employees whose position was correct under the contract and to oppose the employees whose position was incorrect under the contract" (A20). The court said (A22):

> The Southern Council took its time about ascertaining the facts, but by the time it voted finally to go along with Greyhound, it knew all of the facts which are the bases of our conclusion that Greyhound was patently not following the labor contract. We find and conclude that the Southern Council, though it actually realized

11. The court found no merit in Dill's claim that he should have been ranked on the basis of his initial application for employment as a mechanic in 1957 (A12).

> that those in the positition of Dill were being deprived of contract rights, agreed with Greyhound because there was a conflict in interest among the Union members and because it was simply easier to go along with the status quo.

The district court found that Dill was entitled to $3800 compensatory damages from the Company, but none from the Council because "it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages" (A22-A23). However, the court assessed the Council $5,000 in punitive damages, based on the finding that the Council, "acted arbitrarily and with reckless indifference to the rights of Dill in failing to fairly represent him" (A23).

On appeal by Greyhound and the Council, the court of appeals reversed the district court on all points and remanded the case with instructions to dismiss the complaint (A42). With regard to Greyhound's alleged breach of contract, the appellate court held that the Company's interpretation of the seniority provisions was reasonable and fair in light of the changed circumstances occasioned by the use of PTI to recruit and train drivers (A37-A38); the court concluded that the use of the PTI forms to determine seniority ranking did not violate the agreement (A38). Even were respondents' interpretation of the seniority clause incorrect, the court held, the Union would not have breached its duty of fair representation: there was no proof or finding that the Union acted out of hostility, malice or bad faith, and the district court's finding that the Council acted arbitrarily and recklessly was "not supported by substantial evidence and is clearly erroneous" (A41-A42).

The court of appeals also held that even if the district court's findings had been supported by substantial evidence, only an award of compensatory damages would have

been justified here (A42). The court went on to say that in any event, since the district court found that Dill did not sustain any actual damage attributable to the Council, it had no power to award punitive damages as against the Council (*ibid.*).

REASONS FOR NOT GRANTING THE WRIT.

The decision of the court of appeals is correct, and contains nothing meriting review by this Court. *Rudolph* v. *United States,* 370 U. S. 269. As shown in the Statement, *supra,* the court of appeals reversed the district court on factual issues, finding that the interpretation of the seniority clause by Greyhound was reasonable, and that the district court "clearly" erred in finding that the Council had acted arbitrarily and recklessly in representing Dill (A38, A42).

1. Dill asserts, p. 15, that in reversing the district court, the court of appeals "ignored" admissions by Company and Council representatives that the use of PTI application dates to establish seniority rankings violated the agreement. No such admissions were found by the district court, however, and none of the record references cited by Dill support his claim. See p. 12, n. 10, *supra.*

Dill further claims that the court of appeals erred in construing the contract phrase "application for employment" to mean anything other than the form supplied by Greyhound itself. However, in *Humphrey* v. *Moore,* 375 U. S. 335, 346, the Court held that the interpretation of a provision in a collective bargaining agreement "should be commensurate with its purposes." As the appellate court observed (A37-A38), the intent and purpose of the seniority clause was simply to rank operators with the same training school graduation date by the date and hour each operator submitted the employment application with which

he procured his job. Until 1964, that was a form supplied by Greyhound because the training school was run by Greyhound; but in 1964, it was the form supplied by PTI because Greyhound was only hiring people recruited and trained by PTI.[12] Each of the 247 PTI graduates had been required to submit a PTI form before being accepted to driver training school; none had been obliged to submit an application to Greyhound directly, and only a relative handful did. Under these circumstances, it was not unreasonable for the Company and the Union to construe the contract to require that the PTI graduates be ranked by the order in which they filed their PTI applications.

The district court claimed to have based its interpretation on Greyhound's past practices and on interpretations placed upon the same language by Eastern Greyhound (A7-A8). The appellate court pointed out, however, that Greyhound's past practices were irrelevant because of its change in the method of recruiting and training operators, and Eastern Greyhound had never used an outside agency for conducting a training school (A39). On the basis of its appraisal of the record evidence, therefore, the appellate court correctly reversed the unduly restrictive interpretation placed upon the seniority clause by the district court. *Humphrey* v. *Moore, supra.* Such differences between the trial and reviewing courts are of no importance save to the litigants themselves, and should not be reviewed by this Court.

2. If the Court should determine not to review the court of appeals' holding that the Company did not breach the contract, there would be no need to review the remaining questions presented. For the liability of both repondents hinges in the first instance on whether the evidence supports Dill's claim that the seniority ranking given

12. Conversely, the record shows that PTI was training operators for Greyhound exclusively (App. 100, 163).

him by the Company violated the seniority provisions of the contract. *Vaca* v. *Sipes,* 386 U. S. 171, 191. If Greyhound did not act wrongfully in the ranking it gave Dill, then the Union could not have acted wrongfully in agreeing to the Company's action. See *St. Clair* v. *Local Union No. 515,* 422 F. 2d 128, 132 (6th Cir.). Cf. *Czosek* v. *O'Mara,* 397 U. S. 25, 29.

Regardless of the merits of the dispute over the interpretation of the contract, however, there is no basis for reviewing the appellate court's ruling that the Southern Council did not breach its duty of fair representation. Cf. *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 387. Contrary to the petitioner's claim, no conflict exists between the Sixth Circuit's interpretation of that duty as expressed in this case, and the interpretation expressed by the First Circuit in *DeArroyo* v. *Sindicato de Trabajadores Packinghouse,* 425 F. 2d 281.

In *Vaca* v. *Sipes, supra,* the Court, citing its earlier decisions in *Humphrey* v. *Moore,* 375 U. S. 335; and *Ford Motor Co.* v. *Huffman,* 345 U. S. 330; defined a breach of the statutory duty of fair representation as occurring, not when a union has acted incorrectly, but "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith" (386 U. S. at 190). With regard to "the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement" (*ibid.*), the Court went on to say (*id.,* at 191):

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.

Petitioner asserts that while the First Circuit, in *De Arroyo, supra,* appraised a union's conduct in the light of this Court's admonition that a union "may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," the court below failed to apply that standard. Petitioner's argument is without merit, for it is based on a misreading of the decision of the court below. In *De Arroyo,* the First Circuit held that a union had breached its duty of fair representation to five employees by failing to press their grievances at all, in the patently mistaken belief that a pending NLRB proceeding in another matter would adequately protect the grievants' rights (425 F. 2d at 284). The court said that "while due care has not been made a part of the union's duty," the union's conduct in that case was so "inexplicable" as to warrant the jury's "finding that the Union's failure to press plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them" (*ibid.*).

Like the First Circuit, the court of appeals here clearly had in mind the extent of the Southern Council's duty of fair representation when it reviewed the findings and conclusions of the trial cou However, rather than quoting from *Vaca* v. *Sipes, supra,* the Sixth Circuit quoted similar language from its earlier decision in *Balowski* v. *International Union, UAW,* 372 F. 2d 829, 834:

> An action will not lie against a union for failure to process a grievance absent a showing of fraud, misrepresentation, bad faith, dishonesty of purpose or such gross mistake or inaction as to imply bad faith.

This statement of the law is, in substance, no different than the statement in *De Arroyo* quoted above that the duty of fair representation does not impose on a union the duty to exercise "due care" in the handling of grievances, but it does impose the duty not to handle them "arbitrarily" or in a "perfunctory manner." For, if a union's duty of

fair representation does not require it to exercise due care in the processing of a grievance, then it has not breached its duty if it merely handles the grievance negligently. To handle a grievance "arbitrarily" or in a "perfunctory manner" must, therefore, mean something more than handling it negligently—it must mean handling the grievance in a "grossly negligent" fashion, or in a manner so bad as to imply bad faith. As the court below expressed it (A40):

> An employee does not have an absolute right to require his bargaining representative to—
>
> ". . . press his complaint all the way to the very end of the grievance procedures made possible by the collective bargaining agreement. . . . It follows from this that proof that the union may have acted negligently or exercised poor judgment is not reason enough to support a claim of unfair representation." *Bazarte* v. *United Transp. Union,* 429 F. 2d 869, 872 (3rd Cir. 1970).

Petitioner claims that *Bazarte* also conflicts with the decision in *De Arroyo.* As we have shown, however, petitioner errs, because *De Arroyo* recognizes that "negligence" and "poor judgment" by a union in the handling of a grievance does not breach it duty of fair representation.

3. In a related argument, Pet. 17-21, Dill claims that the Union "exceeded its range of discretion in agreeing with the Company that the erroneous seniority list should stand as correct and in refusing to take Dill's grievance to arbitration" (Pet. 19). Relying on *Ford Motor Co.* v. *Huffman,* 345 U. S. 330; and *Elgin J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, petitioner argues that the duty of fair representation of a collective bargaining representative affords it less discretion in the adjustment of grievance under existing agreements than it does in the negotiation of new agreements.

This argument, too, is lacking in merit, for the Court has made plain that the nature of a union's duty of fair representation is no different when it is negotiating new agreements than when it is administering existing ones. In *Vaca* v. *Sipes*, *supra*, 386 U. S. at 177, the Court said:

> It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the U n had a statutory duty fairly to represent all of the employees, both in its collective bargaining with Swift, see Ford Motor Co. v. Huffman, 345 U. S. 330; Syres v. Oil Workers International Union, 350 U. S. 892, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 U. S. 355. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act . . . [citing cases], and was soon extended to unions certified under the N. L. A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U. S. at 342.[13]

4. In any event, under no circumstances could the Southern Council properly be found to have violated its duty of fair representation. Dill's version of the manner in

13. *Burley* is totally inapposite. That case stands for the proposition that a collective bargaining representative cannot, under the Railway Labor Act, agree to a grievance award affecting a grievant's rights under a collective bargaining agreement unless that grievant has authorized the representative to act in his behalf. The reason given is that the processing of grievances is not part of a union's collective bargaining powers under that Act. 325 U. S. at 738. The Court in *Burley* did not decide the issue for which Dill cites it, i.e., the scope of the bargaining agent's power once it has been authorized to act in processing the employee's grievance.

which the Union dealt with his grievance is set forth at pp. 9-10, 19-20, and 23-24 of his petition.[14] Briefly stated, he claims that the Company and Union representatives admitted that the contract required that the PTI graduates be ranked by the date they filed "Greyhound" employment applications; that the Company and the Union had available to them the "Greyhound" forms of virtually all the April 10 graduates and so could have ranked them by the dates those forms were submitted; and that the Union nonetheless virtually ignored the Douthitt-Nipp grievances and made no serious attempt to correct the errors in the seniority roster because of the effect it would have on the other employees on the roster.

We have shown in the statement, however, and the court of appeals found, that the allegations made by Dill are not supported by substantial evidence and are clearly erroneous (A42). Thus, Company and Union officials never admitted that Greyhound breached the agreement when it ranked PTI graduates on the basis of their PTI forms (supra, p. 12, n. 10); there is no proof in the record to support a finding that the Greyhound forms of most of the April 10 graduates were available to the Union at the grievance meetings in January and March 1964 (supra, p. 9, n. 7), rather, the evidence is to the contrary (A35, n. 3; App. 273-277, 284-285); and the Southern Council devoted many hours at two grievance meetings to careful and thoughtful consideration of the problem of ranking the 247 PTI graduates in the light of the Company's inadequate records (A34-35, n. 3). The record shows the Council voted unanimously to accept the rankings as they then stood because the Union officials could

14. Page 23 of the petition contains several significant typographical errors. Douthitt and Nipp filed their grievance in June 1964, not June 1963 as stated in the petition. Also, Maroney received the PTI and Greyhound forms of the PTI graduates in mid-November 1964, not mid-November 1963.

not produce a better method for ranking the operators which could be consistently applied and which adhered to the intent of the contract (App. 222-225, 250-254). Under these circumstances, it cannot be said that the Union either arbitrarily ignored Dill's grievance or treated it in a perfunctory manner.

5. Finally, petitioner asks the Court to review the appellate court's ruling that punitive damages cannot be assessed against the Southern Council because the district court "found that Dill did not sustain any compensatory damage as a result of the acts of the Council" (A. 42). In view of the fact that the court of appeals had already held that the seniority ranking Greyhound gave Dill did not breach the agreement, and that the Council did not breach its duty of fair representation when it acquiesced in the Company's action, the ruling on punitive damages was unnecessary to the disposition of the case and is dictum. It merits review only if the Court should grant certiorari and reverse the court below on the two issues mentioned above. Otherwise, the matter of punitive damages here is of only academic concern, and certiorari should be denied. See *Rice* v. *Sioux City Memorial Park*, 349 U. S. 70. If the Court should grant certiorari on the other issues in this case and reverse the court of appeals, the entire issue of punitive damages in "fair representation" cases would become important to the public and should be reviewed by the Court.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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